UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BEVERAGE ASSOCIATION, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 15-cv-03415-EMC

**ORDER GRANTING PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL**

Docket No. 69

Previously, the Court denied Plaintiffs' motion for a preliminary injunction. *See* Docket No. 68 (order). In response, Plaintiffs have now moved for an injunction pending appeal of that order. Having considered the parties' briefs and accompanying submissions, the Court hereby conditionally **GRANTS** Plaintiffs' motion.[1]

The Court has the authority to issue an injunction pending appeal, notwithstanding its denial of preliminary injunctive relief, pursuant to Federal Rule of Civil Procedure 62(c). That rule provides that, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c).

The City argues that Plaintiffs are not entitled to relief under Rule 62(c) because the rule specifies that relief may be given "[w]hile an appeal is pending," Fed. R. Civ. P. 62(c), and, here, Plaintiffs have not yet filed a notice of appeal. However, as Plaintiffs argue, this position is not

[1] The parties agreed to forego a hearing on the motion.

persuasive. The Wright & Miller treatise explains as follows:

> Rule 62(c) says that the district court may act in connection with injunctions "while an appeal is pending." It may be argued that this means that the court may not make an order under Rule 62(c) before the appeal has been taken, and further, that after the taking of the appeal the district court no longer has jurisdiction of the case. However, those arguments would make the rule a nullity and are unsound. When there is reason to believe that an appeal will be taken, there is no reason why the district court should not make an order preserving the status quo during the expected appeal. The order can be conditioned on an appeal being taken by a stated date.

Wright, *et al.*, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.).

The Court now turns to the issue of what factors are considered in determining whether a party is entitled to an injunction pending appeal. Plaintiffs argue that the typical preliminary injunction factors are considered. *See Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 883 (E.D. Cal. 2004) (stating that, "[i]n deciding whether to grant an injunction pending appeal, courts apply the standard employed when considering a motion for a preliminary injunction"); *see also Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137, 1144 (9th Cir. 2011) (stating that, "'[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest'"). Relying on *Hilton v. Braunskill*, 481 U.S. 770 (1986), which formally addressed a request for a stay of an order pending appeal rather than an injunction, the City argues that the party seeking an injunction pending appeal must make a "strong showing" of likelihood of success on the merits. *Id.* at 776. At the very least, the City argues, Plaintiffs here "must make an 'even stronger showing' that they will succeed on the merits than they did in their preliminary injunction motion." Opp'n at 2. *See, e.g.*, *See Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970) (stating that, "[s]ince appellants failed to make out a prima facie case demonstrating a reasonable probability of success on the merits[,] a fortiori they did not make that even stronger showing that is prerequisite to the grant of a stay and the issuance of an injunction pending a hearing on the merits of an interlocutory appeal").

It is questionable, however, whether *Hilton* should apply to a motion for injunction

pending appeal of an order denying a preliminary injunction. Under the City's position, a party who is denied a preliminary injunction (because the requisites for preliminary injunction relief are not met) could never get an injunction from the district court pending appeal. *See Protect*, 377 F. Supp. 2d at 884 (stating that "[s]everal courts have observed that the 'success on the merits factor cannot be rigidly applied,' because if it were, an injunction would seldom, if ever, be granted 'because the district court would have to conclude that it was probably incorrect in its determination on the merits'"). Such a result would not be consistent with the express language of Rule 62(c) which contemplates the possibility that the district court may grant an injunction pending appeal from an interlocutory order denying preliminary injunction. "An injunction is 'frequently issued where the trial court is charting a new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review.'" *Id. See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (stating that, "[a]fter noting the various interests of the state and the petitioner that the court could take into consideration in adjudicating the stay request, *Hilton* explained that the balance of the relative equities 'may depend to a large extent upon determination of the State's prospects of success in its appeal'").

Thus, an injunction pending appeal may be appropriate, even if the Court believed its analysis in denying preliminary injunctive relief is correct. This is such a case.

Although the Court believes it correctly decided the issues presented, it recognizes that the Ninth Circuit has not squarely decided whether and how *Zauderer* applies to the context of this case: *i.e.*, a compelled disclosure in the context of commercial speech where the government interest is not consumer deception, but public health and safety. Furthermore, as the Court acknowledged in its order denying preliminary injunctive relief, there is at least a close question as to whether Plaintiffs have raised serious questions on the merits, particularly because the compelled disclosure has a 20% size requirement which is "not insubstantial." Docket No. 68 (Order at 26, 30). There is thus a plausible argument that there are serious questions on the merits and irreparable injury (*see Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973-74 (9th Cir. 2002)). In addition, there is a good chance that the injunction pending interlocutory appeal will be relatively brief because the appeal will likely be resolved on an expedited basis (given

Ninth Circuit Rule 3-3, which allows for expedited briefing on preliminary injunction appeals and thus the hardship to the City may be limited).

Accordingly, in light of these particular circumstances the Court grants Plaintiffs' motion for an injunction pending appeal.

Finally, to the extent Plaintiffs seek clarification on footnote 1 of the Court's order denying preliminary injunctive relief, that request is granted. Footnote 1 more accurately should read (with new language in bold):

> Plaintiffs have not delayed in seeking preliminary injunctive relief. Plaintiffs initiated this lawsuit on July 24, 2015. See Docket No. 1 (complaint). On the same day, Plaintiffs moved for a preliminary injunction **regarding the other ordinance**. *See* Docket No. 14 (motion). Subsequently, the parties agreed that the City would not enforce **that** ordinance pending a final judgment in this case. *See* Docket No. 35 (stipulation and order, filed in August 2015). A few months thereafter, the Court set a hearing and briefing schedule for the preliminary injunction motion **regarding this ordinance**. *See* Docket No. 45 (stipulation and order, filed in October 2015).

This order disposes of Docket No. 69.

**IT IS SO ORDERED**.

Dated: June 7, 2016

EDWARD M. CHEN
United States District Judge